SUPREME COURT, U. S.

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# Supreme Court of the United States

October Term, 1969

No. 409

JAMES B. WILKINSON, Commonwealth's Attorney for the City of Richmond, Virginia, and FRANK S. DULING, Chief of Police for the City of Richmond, Virginia,

*Petitioners,*

v.

TYRONE, INC., a Virginia Corporation, trading as Lee Art Theatre, and HOWARD WILLIAM BURTNETT,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 410 F.2d 639. The opinion of the United States District Court for the Eastern District of Virginia is reported in 294 F.Supp. 1330.

## JURISDICTION

The judgment of the court of appeals was entered on May 6, 1969. The petition for a writ of certiorari was filed

on August 1, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Does the seizure of motion picture films by the petitioners without affording to the respondents a prior adversary hearing on the question of alleged obscenity violate the First Amendment of the United States Constitution?

2. On the facts of this case, are the respondents entitled to equitable relief from pending state court prosecution?

## STATEMENT

On the night of October 21, 1968, the motion picture film, "Angelique in Black Leather," and the previews of another film, "Of the Same Gender," were seized by Richmond police officers acting at the direction of the petitioners, the Commonwealth's Attorney and the Chief of Police for the City of Richmond, Virginia. Prior to the seizure, which occurred during the business hours of the respondents' theatre, the police officers had obtained a search warrant which had commanded them to enter the theatre operated by the respondents at 934 West Grace Street, Richmond, Virginia, and there seize the said "obscene films."

Prior to the interruption of the respondents' business operations by the seizure on the evening of October 21, 1968, there had been no adversary determination of the obscenity of the films and prints in question. No adversary hearing on the question of alleged obscenity had been afforded the owner of the film, or the exhibitor, Tyrone, Inc., or its theatre manager, the respondent, Burtnett. The seizures were without the consent of the respondents and without any notice to them in advance.

Following seizure of the films, Criminal Informations were returned in the state court charging the respondent, Tyrone, Inc., with the possession and exhibition of a lewd and obscene motion picture and charging Howard William Burtnett with managing a theatre where an obscene motion picture was shown and displayed to the public. The criminal cases against the respondents are now pending and awaiting trial in the Hustings Court of the City of Richmond. The films and prints in question have remained in the possession of the petitioners.

The respondents initiated this case by bringing an action under 42 U.S.C. § 1983, the Civil Rights Act, alleging a violation of their rights under the First, Fourth, and Fourteenth Amendments and praying for equitable relief from the seizures. The respondents seek an injunction against the pending and any further prosecutions on obscenity charges, where seizures of motion picture films are made without a prior adversary hearing on the question of obscenity. The thrust of the complaint was that the seizures materially and adversely affected the Constitutional rights of the respondents by inhibiting dissemination of presumably protected motion pictures that had not been declared to be obscene or in violation of any law. It was alleged that the seizures and the threats of seizures amounted to repression of protected freedoms, and that the facts of the case demonstrated irreparable damage and injury.

The evidence in support of the respondents' case in the District Court established an unequivocal pattern of past conduct on the part of law enforcement officials in the City of Richmond. There had been three prior raids on the theatre resulting in the seizures of films. The first raid occurred in March, 1966, which resulted in a conviction which was overturned later by the United States Supreme

Court in *Lee Art Theatre, Inc.* v. *Virginia*, 392 U.S. 636 (1968). The second raid occurred in August, 1966, and resulted in a conviction which was not appealed. In October, 1966, another raid and seizure resulted in a conviction which is now on appeal in the Supreme Court of Appeals of Virginia. In each case police officers raided the respondents' theatre after securing search warrants and after consultation with the petitioner, Wilkinson. On one of these occasions, October 26, 1966, two 35 millimeter movie projectors were seized. On the same occasion police officers damaged machinery and equipment belonging to the theatre owners, including the cutting of cables and the electrical wiring to the motion picture projectors, thereby forcing the theatre owners to spend in excess of $1,500.00 for repairs. This damage was unrelated to any legitimate state purpose.

The petitioner, Wilkinson, testified in the District Court. He admitted that the seizures of all films in 1966 and in 1968 were accomplished in the absence of a prior adversary hearing on the question of obscenity. He defended the seizure of the projectors on the theory that they were instrumentalities used in the commission of a crime. He stated that the seizures would be repeated in the future, and that he did not intend to afford a prior adversary hearing until he was ordered to do so by some authority of competent jurisdiction. He stated that he was familiar with the decision of the United States Supreme Court in *A Quantity of Books* v. *Kansas*, 378 U.S. 205, at the time of all the aforesaid seizures, but stated that he did not feel bound by that decision.

Virginia law provides a method which, although not required by Virginia law, may be employed to afford an adversary hearing in proceedings against movie films alleged to be obscene. See § 18.1-236.3, Virginia Code, 1960,

and 1968 Supplement, § 18.1-234.4. The petitioner, Wilkinson, admitted that the State statutes herein referred to outline a procedure whereby he could have afforded the respondents a prior adversary hearing, but he failed to satisfactorily explain why he ignored them.

## ARGUMENT

### I

The first issue in this case is whether the petitioners, in instituting a criminal obscenity prosecution following the seizure of a motion picture film without first affording the possessors or exhibitors of the film a prior adversary hearing on the film's alleged obscenity, are in violation of the Constitution. *A Quantity of Books* v. *Kansas,* 378 U.S. 205, 12 L.Ed.2d 809 (1964) holds that before presumably protected material can be seized a prior adversary hearing is constitutionally necessary under the First and Fourteenth Amendments.

The petitioners contend that since only four justices concurred in the procedural basis for the opinion in *Books,* it is not binding on them. With respect to this contention, the respondents submit that more recent opinions by the Supreme Court and other courts have treated this "opinion of the Court" as establishing the law on this point. *Freedman* v. *Maryland,* 380 U.S. 51, 13 L.Ed.2d 649 (1965); *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968); *United States* v. *18 Packages of Magazines,* 238 F.Supp. 846 (N.D. Calif. 1964); *Cambist Films* v. *Illinois,* 292 F.Supp. 185 (N.D. Ill. 1968).

*A Quantity of Books* v. *Kansas, supra,* represents no radical departure from existing precedents. Operating under the Kansas statutes in that case, the State Attorney General filed seven novels with his complaint and identified

by information some 59 novels. Further, although it was not required under the Kansas statutes, the district judge, on application of the Attorney General, conducted a 45 minute ex parte inquiry during which he "scrutinized" the seven books. These steps were thought by the Kansas Attorney General to be necessary under *Marcus* v. *Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127. When the warrant was executed, 31 of the identified 59 novels were seized, including all copies of the 31 books.

The following language in the Court's opinion in *Books* should leave no doubt as to the reason for reversal, 12 L.Ed.2d at page 812:

> "It is our view that since the warrant here authorized the sheriff to seize all copies of the specified titles and since P-K was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issue, the procedure was likewise constitutionally deficient. This is the teaching of *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L.Ed.2d, 1469, 77 S.Ct. 1325. See *Marcus,* 367 U.S. at pp. 734-738, 6 L.Ed.2d 1138, 1139. The New York injunctive procedure there sustained does not afford ex parte relief but postpones all injunctive relief until both sides have had an opportunity to be heard. *Tenny* v. *Liberty News Distributors,* 13 App.Div.2d 770, 215 NYS2d 663, 664. In *Marcus* we explicitly said that Kingsley Books 'does not support the proposition that the State may impose the extensive restraints imposed here on the distribution of these publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material is legally obscene.' "

The argument of the petitioners is that by their attempted compliance with *Marcus* v. *Search Warrant, supra,* they are free to ignore later decisions of the United States Supreme Court. They take the same position now as was taken by

the Kansas Attorney General in the *Books* case, which was decided three years after *Marcus*. Moreover, the position of the defendants completely ignores the rulings of this Court in the movie censorship cases, including *Freedman* v. *Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734, (1965).

In *Freedman* v. *Maryland, supra,* this Court struck down the Maryland censorship statute precisely because there was no procedure therein contained for prompt judicial review concerning the alleged obscenity of a film. The Court said, at page 654 of the opinion in 13 L.Ed.2d 624:

> "The teaching of our cases is that, because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint. See *Bantam Books, Inc.* v. *Sullivan, supra; A Quantity of Books* v. *Kansas,* 378 U.S. 205, 12 L.Ed.2d 809, 84 S.Ct. 1723, *Marcus* v. *Search Warrant, supra; Manual Enterprises* v. *Day,* 370 U.S. 478, 8 L.Ed.2d 639, 82 S.Ct. 1432 . . ."

Also, *Freedman* v. *Maryland, supra,* is relevant because it pointed the way for the petitioners. The Court cited there *Kingsley Books, Inc.* v. *Brown,* 354 U.S. 436, 1 L.Ed. 2d 1469, which upheld a New York injunctive procedure designed to prevent the sale of obscene books. That procedure postponed any restraint against sale until a judicial determination of obscenity following notice and an adversary hearing. Further, there are existing Virginia statutes, specifically Sections 18.1-236.3 and 18.1-236.4 of the 1950 Virginia Code as amended (1968 Supp.) which were available to the petitioners and which could have been used by the petitioners to afford to the respondents a prior

adversary hearing on the alleged obscenity of the film in question.

There can be no doubt on the facts in the case at bar that an effective prior restraint was imposed on the petitioners by the police seizure of their motion picture "Angelique." Since the seizure of the film was without a prior adversary determination of the film's obscenity, there has been an abridgment of the right of the public in a free society to unobstructed circulation of films.

In reversing *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 20 L.Ed.2d 1313, 88 S.Ct. 2103, (1968) this Court cited two cases, *Marcus* v. *Search Warrant, supra,* and *Freedman* v. *Maryland, supra. Marcus* has been the law since 1961, and the respondents submit that it was unnecessary for the Court in *Lee Art Theatre* v. *Virginia,* to base its judgment for reversal on *A Quantity of Books* v. *Kansas.* Therefore, the failure of the Court there to cite *Books* can offer no comfort to petitioners inasmuch as *Books* has been the law since 1964.

*Schackman* v. *Arnebergh,* 258 F.Supp. 983, (1966), cited by the petitioners, is distinguishable because that case holds that no prior adversary hearing is necessary prior to arrest of a defendant, a situation entirely different from the questions and facts here presented.

The purpose of the procedural requirement of an adversary hearing is to safeguard against governmental suppression of expression. Such a requirement does not prohibit prosecution under obscenity statutues. The lesson of the cases cited is simply that seizuure of allegedly obscene publications or films without a prior adversary proceeding on the issue of obscenity violates the First Amendment to the Constitution of the United States and is a prior restraint condemned by this Court. See *Joseph Burstyn, Inc.*

v. *Wilson,* 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; *Kingsley* v. *Brown, supra; Jacobellis* v. *Ohio,* 378 U.S. 184, 84 S.Ct. 1676, 12 L.Ed.2d 793; *Metzger* v. *Pearcy,* 393 F.2d 202 (7 Cir. 1968).

II

In this case the respondents did not ask the United States District Court to declare any State statute unconstitutional. Further, the respondents did not base their prayer for relief upon the ground of the unconstitutionality of any State statute. Therefore, there was no necessity for the convening of a three judge Federal Court pursuant to Title 28 U.S.C. § 2281. See *Swift & Co.* v. *Wickham,* 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194.

The complaint filed by the respondents in the District Court pursuant to the Civil Rights Act, Title 42 U.S.C. § 1983, depicted a pattern of conduct on the part of State officials that abridged the constitutional rights of the respondents and amounted to nothing less than bad faith enforcement of State law. (See petitioners' Appendix, pp. A20-A26.) The evidence heard in the District Court revealed a series of unconstitutional seizures of motion picture films, damage by police officials to the property of the respondents, and an announced intention by the petitioners to continue the illegal and unconstitutional seizures.

The respondents recognize that Federal injunctive relief is normally not granted to stop prosecution in a state court, but it is submitted that in the area of First Amendment freedoms, an exception has been recognized by this Court. It has been recognized that the exercise of these freedoms is subject to irreparable injury when unlawful criminal prosecution is threatened or maintained. See *NAACP* v. *Button,* 371 U.S. 415 (1963); *Tugwell* v. *Bush,* 367 U.S.

907 (1961); *Gremillion* v. *United States,* 368 U.S. 11 (1961). Further, the alternative holding of *Dombrowski* v. *Pfister,* 380 U.S. 479, 14 L.Ed.2d 22, 85 S.Ct. 1116, is that bad faith enforcement of state law will justify Federal injunctive relief from state criminal prosecution.

In *Dombrowski* v. *Pfister, supra,* this Court said, at pages 27 and 28 of the opinion in 14 L.Ed.2d:

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings. In *Douglas* v. *City of Jeanette,* 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877, for example, the Court upheld a district court's refusal to enjoin application of a city ordinance to religious solicitation, even though the ordinance was that very day held unconstitutional as so applied on review of a criminal conviction under it. *Murdock* v. *Pennsylvania,* 319 U.S. 105, 87 L.Ed. 1292, 63 S.Ct. 870, 882, 146 ALR 81. Since injunctive relief looks to the future, and it was not alleged that Pennsylvania courts and prosecutors would fail to respect the Murdock ruling, the Court found nothing to justify an injunction. And in a variety of other contexts the Court has found no special circumstances to warrant cutting short the normal adjudication of constitutional defenses in the course of a criminal prosecution. In such cases it does not appear that the plaintiffs have been threatened with any injury other than that incidental to every criminal proceeding brought lawfully and in good faith or that a federal court of equity by withdrawing the determination of guilt from the state courts would rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court. *Douglas* v. *Jeanette, supra,* 319 U.S. 164, 87 L.Ed. at 1330.

> "But the allegations in this complaint depict a situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights. They suggest that a substantial loss or impairment of freedoms will occur if appellants must await the state court's disposition and ultimate review in this Court of any adverse determination. These allegations, if true, clearly show irreparable injury."

The conduct of the petitioners commencing with the initial raids on the respondents' theatre in March, 1966, the later raids during 1966, the raids resulting in the prosecutions now pending in the Hustings Court of the City of Richmond and in the Supreme Court of Appeals of Virginia, the unexplained seizure of motion picture projectors, the wilful damage inflicted on the property of the respondents, the avowed and expressed intention of the petitioner, Wilkinson, to continue seizures of films without first affording respondents the requisite adversary hearings, notwithstanding his prior knowledge of and familiarity with *A Quantity of Books* v. *Kansas, supra*, and the existence and availability of a State procedure relating to adversary hearings, all combine to present for this Court a chilling picture of prior restraint and irreparable injury.

Freedom of expression, protected by the First Amendment, becomes meaningless if the respondents must ultimately await the Supreme Court's review in every case brought by the petitioners. Unlike the situation in *Douglas* v. *City of Jeanette*, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877, the record here clearly demonstrates that the petitioners have been and are refusing to recognize existing constitutional law rulings of the United States Supreme Court. In this area of First Amendment freedoms, the prior suppression of motion picture films, together with the publicly announced intention of the petitioners to continue

the seizures in violation of existing law, clearly shows the necessary irreparable injury. It is respectfully submitted that the Courts below were correct in enjoining future seizures without prior adversary hearings, but they erred in holding on the undisputed evidence that there was no bad faith enforcement of state law which would justify injunctive relief from the pending state prosecution under *Dombrowski.* No magic words can change the clear meaning of the facts of this case. The unconstitutional seizures of protected material, the wilful damage to the respondents' business and property, unrelated to any legitimate state interest, the danger to the public at large in a free society, the admission by the petitioners of knowledge of the requirement of *Books, supra,* the announced intention of the petitioners to continue their unconstitutional conduct, unless enjoined, are facts susceptible of but one interpretation. It is difficult to imagine a case where there is more undisputed, objective evidence of bad faith and of a continuing course of conduct by state officials to improperly suppress expression.

Therefore, because the petitioners have engaged in a course of conduct in serious and wilful violations of the rights of the respondents under the Constitution of the United States over a period of almost three years, and because they have expressed their intention to continue said conduct until enjoined or until they change their interpretation of the law, the decisions of this Court to the contrary notwithstanding, the respondents submit that this is a proper case for injunctive relief both from the pending prosecution in the Hustings Court of the City of Richmond, Virginia, as well as from any future seizures without first affording the respondents a prior adversary hearing on the question of obscenity.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari filed by the petitioners in this case should be denied, and that the petition for a writ of certiorari filed by the respondents as petitioners in the case of Tyrone, Inc., etc. and Howard William Burtnett, Petitioners v. James B. Wilkinson, etc. and Frank S. Duling, etc., Respondents, should be granted.

Respectfully submitted,

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November 19, 1969